IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PERSONNEL DATA SYSTEMS, INC.,	:	
	:	
Movant,	:	
	:	
v.	:	MISC. NO.: 00-MC-166
	:	
OPENPLUS HOLDINGS PTY LTD.,	:	
	:	
Respondent.	:	

M E M O R A N D U M

Ludwig, J. **January 18, 2001**

Personnel Data Systems, Inc. moves under the Federal Arbitration Act, 9 U.S.C. § 1, et seq., to vacate or modify an arbitration award in favor of OpenPlus Holdings Pty Ltd. Jurisdiction is federal question. 28 U.S.C. § 1331. The motion will be denied.

On August 20, 1998, Personnel Data Systems, Inc. (PDS) and OpenPlus entered a "Definitive Merger Agreement and Plan of Merger" (DMA). The merger did not occur. On December 5, 1998, OpenPlus filed suit against PDS in Texas state court, claiming that PDS violated the DMA by not timely disclosing material facts regarding its president. On January 15, 1999, PDS removed the action to the United States District Court for the Western District of Texas. On

January 19, 1999, under a provision in the parties agreement – DMA – movant PDS compelled arbitration.[1]

In its arbitration demand, PDS sought damages and declarations: (1) that the DMA was not conditioned on funding; and (2) that PDS did not violate the DMA by not disclosing certain matters concerning the background of its president. PDS mem. exh. A. OpenPlus counterclaimed that PDS violated the DMA by not providing material information "necessary to make not misleading or untrue, statements contained in cited sections of the DMA." PDS mem. exh. F.

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[1] The DMA:

> 7.10. Arbitration. Any dispute, controversy, or claim arising out of or relating to this Agreement (including the indemnification provisions contained herein), or the validity, interpretation, enforceability, or breach thereof, which is not settled by agreement between the parties, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association or any successor organization (the "Association") then in effect. . . . The arbitrator thus selected shall determine the controversy in accordance with the terms of this Agreement and the laws of the Commonwealth of Pennsylvania as applied to the facts found by him. . . . The decision of the arbitrator shall be final and binding on the parties. A judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction, or application may be made to such court for judicial acceptance of the award and an order of enforcement as the case may be. . . .

Pet. exh. B at 29. On March 30, 1999, the Texas action, OpenPlus Holdings Pty Ltd. v. Personnel Data Sys., Inc., Civ. No. A-99-CA-036-JN, was stayed pending completion of the arbitration.

On April 3, 2000, following discovery and four days of hearings,[2] the arbitrator issued a "Partial Award," ruling against PDS on its liability claim and in favor of OpenPlus on its counterclaim.[3] PDS mem. exh. C. On August 18, 2000, in a "Final Award," the arbitrator granted OpenPlus $352,150, plus interest from the date of the partial award, at the rate of prime plus one and one-half percent. PDS mem. exh D. The award was "in full settlement of all claims and counterclaims submitted to . . . arbitration." Id. PDS now moves to vacate the partial and final awards, 9 U.S.C. § 10 (counts one, two, and three); or, in the alternative, to modify the final award, 9 U.S.C. § 11(count four).[4]

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[2] The arbitration hearings were held on March 13-16, 2000, in Media, Pa. See American Arbitration Association Matter No: 13 348 00011 99 V/K.

[3] The partial award:

> III. Arbitrator's Findings
> On the claim of PDS against OpenPlus for breach of the DMA, the Arbitrator finds against PDS and in favor of OpenPlus. On the counterclaim of OpenPlus against PDS for breach of the DMA, the Arbitrator finds in favor of OpenPlus and against PDS. On all other claims of OpenPlus against PDS, the arbitrator finds in favor of PDS and against OpenPlus.

PDS mem. exh. C at 4.

[4] On August 18, 2000, OpenPlus moved to confirm the arbitration award in the Texas District Court. On September 5, 2000, PDS filed its motion here. On October 3, 2000, the Texas District Court stayed its action pending resolution of the PDS motion. See Amended Order, OpenPlus Holdings Pty Ltd. v. Personnel Data Sys., Inc., Civ. No. A-99-CA-036-JN (W.D. Tx. Oct. 3, 2000) ("Upon consideration of the convenience of the parties and the interests of justice, the Court finds the Pennsylvania litigation should proceed until that court issues a ruling on Defendant's motion to vacate and/or modify the award."). On November 28, 2000, OpenPlus's motion to dismiss or transfer to the Texas District Court was denied without prejudice to reassertion pending this ruling.

Section 10(a) of the Federal Arbitration Act empowers a federal court to vacate an award:

> (1) Where the award was procured by corruption, fraud, or undue means.
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient evidence shown, or in refusing to hear evidence pertinent and material to the controversy; or if any other misbehavior by which the rights of any party have been prejudiced.
> (4) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Judicial review is limited to the four grounds listed in § 10(a) and where there has been a "manifest disregard" of the law; in short, under the FAA, a court will set aside an award only in "very unusual circumstances." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S. Ct. 1920, 1923, 131 L. Ed. 2d 985 (1995). As articulated by our Court of Appeals, the standard of review is stringent and restrictive. United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 379 (3d Cir. 1995) (vacation allowed only if there is "absolutely no support at all in the record justifying the arbitrator's determinations") (citation omitted). Moreover, the FAA "establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate." Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987). PDS charges the arbitrator with having

"imperfectly executed" his powers by not making a mutual, final and definite award, 9 U.S.C. § 10(a)(4), and with manifest disregard of the law.

In particular, OpenPlus' "Answering Statement and Counterclaim" sets forth that PDS suppressed information about its president that, once discovered, led to the withholding of venture capital funding from the merged entity. PDS mem. exh. F ¶ 14. According to PDS, the arbitrator accepted OpenPlus' submission and failed to rule on PDS' request for declaratory relief – and in so doing, improperly found the non-disclosures to be material. For this reason, PDS says, the award does not resolve the issues between the parties and is defectively inadequate. PDS mem. at 6.

PDS' argument is without merit. An arbitration award need not mention all claims to in order to be regular and complete. See Gilmer v. Interstate / Johnson Lane Corp., 500 U.S. 20, 31, 111 S. Ct. 1647, 1655, 114 L. Ed. 2d 26 (1991); Remmey v. Painewebber, Inc., 32 F.3d 143, 150-51 (4th Cir. 1994) (arbitrators' case summary not discussing all claims was of "no moment"). Therefore, "it is not reasonable to attempt to draw conclusions or inferences from an arbitrator's not doing something that he was not obligated to do." Coltec Industries Inc. v. Elliott Turbocharger Group, Inc., Nos. Civ. A. 99-1400, 99-MC-36, 1999 WL 695870 (E.D. Pa. Sept. 9, 1999). Here, the parties also agreed to be bound by the final award, which unambiguously stated: "This Award is in full

settlement of all claims and counterclaims submitted to this arbitration."[5] PDS mem. exh. D; see Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990) (statement that "all claims submitted by petitioner . . . are denied" satisfied the "mutual, final and definite" requirement).

Moreover, PDS' requests for declaratory relief are subsumed in the decision for OpenPlus. The arbitrator outlined OpenPlus' claim:

> OpenPlus alleged that PDS . . . materially breached the terms of the DMA, and other obligations, by failing to disclose material facts that were necessary to make not misleading or untrue, statements contained in cited sections of the DMA. OpenPlus claimed that PDS . . . failed to disclose the existence of a felony tax conviction, and subsequent probation violation by PDS, Chief Executive Officer, Steven Brody.

PDS mem. exh. C at 4. In its request for arbitration and again at the arbitration hearing, PDS asserted that the DMA was not conditioned on funding. Subsequently, having "heard the proofs and allegations of the parties," the arbitrator entered an award for OpenPlus. This conclusion could have been

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[5] PDS' maintains that the doctrine of "functus officio" applies. "Functus officio" reflects an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." La Vale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). According to PDS, under this doctrine, the arbitrator's power to rule on liability ended when he issued the partial award; and, therefore, the "boilerplate language" in the final award should have no effect. Nevertheless, "[w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify." Id. at 573. Assuming, as PDS also asserts, that the partial award was incomplete for not ruling on PDS' declaratory relief requests, the arbitrator retained the authority to deny PDS' claims in the final award.

reached regardless of whether the DMA was conditioned on funding.[6] Therefore, inasmuch as a discussion of materiality was not required or needed for the entry of a final and complete award, PDS' request for relief under § 10(a)(4) must be denied.

PDS' claim based on manifest disregard of law must also be rejected. The "manifest disregard" standard has been characterized as "willful inattentiveness to the governing law." Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988). It "clearly means more than error or misunderstanding with respect to the law." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). "There must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." O.R. Securities, Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 747 (11th Cir. 1988).

According to PDS, the DMA's integration clause and the Pennsylvania parole evidence rule should have precluded a finding that the DMA was conditioned on funding. Specifically, "[n]owhere in the DMA does it say the merger is conditioned upon financing . . . [and] under the Pennsylvania parole evidence rule, which was argued to the arbitrator, it would be an irrational result for the DMA to be interpreted as conditioned upon financing." However, whether

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[6] According to OpenPlus, had it known that the proposed CEO of the resulting company was a convicted felon, it would not have entered the agreement. "Simply put, but for the concealment and non-disclosure of those material facts, OpenPlus would not have incurred damages such as the time and money wasted in negotiating and putting together the DMA." OpenPlus mem. at 18-19.

the arbitrator misconstrued the contract or committed an error of law is beyond the scope of this review. Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 62 (3d Cir. 1986) (citations omitted). The materials proffered by PDS do not suggest that the arbitrator intentionally disregarded the law.

PDS also moves to modify the award of interest at the rate of prime plus one and one-half percent.[7] Under 9 U.S.C. § 11, an arbitration award may be modified or corrected:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. PDS maintains that, because the parties did not submit a specific interest rate, the arbitrator was bound to assess pre-judgment interest under

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[7] The final award:

> The arbitrator herewith awards to OpenPlus Holdings Pty, Ltd., ("OpenPlus") monetary damages in its favor and against Personnel data Systems, Inc., ("PDS"), in accordance with the DMA Section 6.2, in the amount Three Hundred Fifty Two Thousand One Hundred Fifty Dollars ($352,150.00) plus interest at the prime rate of interest plus one and one-half (1½%) percent from the date of the PARTIAL AWARD on April 3, 2000, to the date of full and final payment.

PDS mem. exh. C at 4. In arbitrations, the adjudication is termed an "award." The law of pre-judgment interest applies to arbitration awards until the date of the confirmation of the award – and the law of post-judgment interest, thereafter.

Pennsylvania law, 42 Pa. C.S.A. § 8101; 41 P.S. § 202; and post-judgment as set by 28 U.S.C. § 1961(a).[8]

As approved in our Circuit, the rate of pre-judgment interest is a matter for the discretion of the district court in actions under the FAA, and the rate fixed by state law is not binding. Sun Ship, Inc., 785 F.2d at 63 (district courts may follow 28 U.S.C. § 1961 in calculating pre-judgment interest in FAA case). The DMA called for resolution of a dispute "by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." PDS mem. exh. B. Under Rule 45(d) of the AAA Commercial Dispute Resolution Procedures, an award may include "interest at such rate and from such date as

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[8] 28 U.S.C. § 1961(a):

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

the arbitrator(s) may deem appropriate."[9] Insofar as the arbitrator determined the rate of pre-judgment interest, that assessment will not be modified.

As to the applicable interest rate following confirmation of an award, PDS cites Carte Blanche (Singapore) PTE., Ltd. v. Carte Blanche International, Ltd., 888 F.2d 260, 269 (2d Cir. 1989), for the proposition that the rate specified by 28 U.S.C. 1961(a) must be applied. In these circumstances, the post-judgment rate of interest will be referred to the United States District Court for the Western District of Texas, OpenPlus Holdings Pty Ltd. v. Personnel Data Sys., Inc., Civ. No.

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[9] Rule 45 of the Commercial Dispute Resolution Procedures (Including Mediation and Arbitration Rules):

> (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
>
> (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
>
> (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-51, R-52, and R-53. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
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> (d) The award of the arbitrator(s) may include: (a) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and (b) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

Commercial Dispute Resolution Procedures, 1999 WL 1627984, at *14 (A.A.A.).

A-99-CA-036-JN (W.D. Tx.), for determination in conjunction with its ruling on the motion to confirm the arbitration award.

An order accompanies this memorandum.

Edmund V. Ludwig, J.

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PERSONNEL DATA SYSTEMS, INC.,	:	
	:	
Movant,	:	
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v.	:	MISC. NO.: 00-MC-166
	:	
OPENPLUS HOLDINGS PTY LTD.,	:	
	:	
Respondent.	:	

O R D E R

Ludwig, J.

AND NOW, this day of January, 2001, Personnel Data Systems' motion to vacate, or in the alternative, to modify the arbitration award is denied.

Edmund V. Ludwig, J.